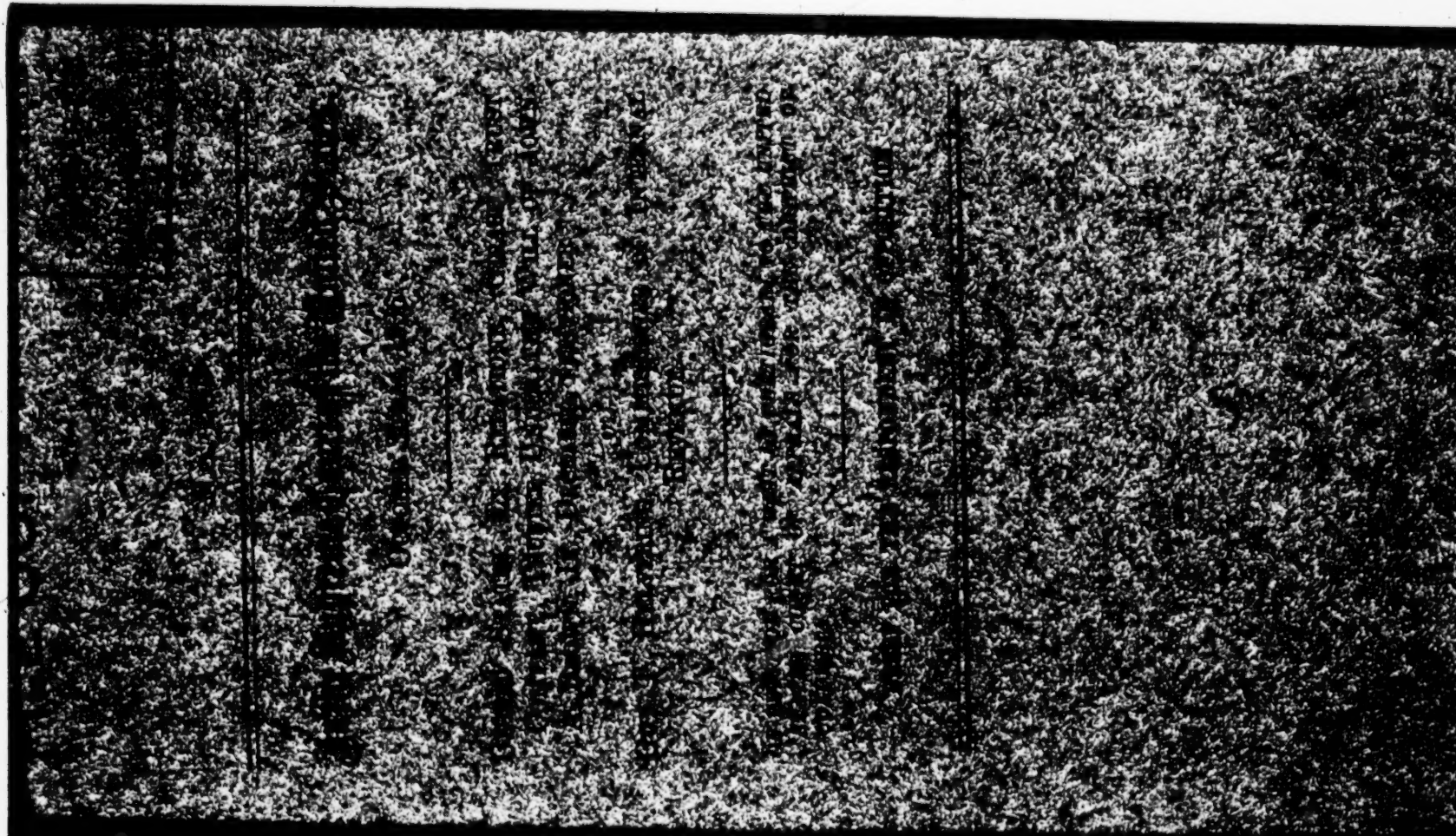

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 285

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

There was no opinion by the District Court for the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia (R. 33–40) has not yet been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered

May 18, 1936 (R. 40–41). The petition for writ of certiorari was filed August 14, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a writ of mandamus should issue to compel the Commissioner of Internal Revenue to refund to a trustee overpayments of taxes found by the Board of Tax Appeals to have been made on the income of the trust for certain years, the beneficiary of the trust having been erroneously refunded the taxes paid by her on the income received from the trust during some of those years and having paid no tax on the income received from the trust for one of the years, when the recovery of the refunds from the beneficiary, in an affirmative action, and the assessment and collection of the unpaid tax are barred by the statute of limitations.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 13–19.

STATEMENT

The case was heard and decided on demurrer to the answer (R. 29). The material facts appearing from the allegations of the petition and answer (R. 2–25) are as follows:

Petitioner is the trustee under the will of John A. Brown, Jr., deceased, and instituted this suit in that capacity. The decedent died testate July 17, 1919, a resident of Newtown Township, Delaware County, Pennsylvania. By the terms of his will his residuary estate was bequeathed to petitioner, in trust, to collect the income and after payment of certain expenses to distribute the net, to the extent of $200,000 per year, to his widow, Harriet Etting Brown, for life, and any excess above that amount to his children (R. 2–3, 7–16). The widow elected to take under the will in lieu of dower or statutory rights. Petitioner received the property in December 1920, and has since continued to act as trustee (R. 3).

During the years 1924 to 1930, inclusive, petitioner currently distributed to the widow the entire net income of the trust estate and, pursuant to the requirements of Section 219 of the Revenue Act of 1924 and corresponding provisions of the Revenue Acts of 1926 and 1928 (Appendix, *infra*, p. 13), duly filed with the Collector of Internal Revenue income tax returns for the trust estate for each of those years, deducting from the net income of the estate the amounts distributed to the widow. The widow reported all such distributions for the years 1924 to 1927, inclusive, in her income tax returns, and paid a tax thereon. In her return for the year 1928, however, the widow did not include as a part of her taxable income the income

received by her from the trust during that year (R. 3).

On March 15, 1929, the Commissioner of Internal Revenue duly asserted deficiencies against petitioner for the years 1924 and 1925, basing his action upon a disallowance of the deduction of the amounts distributed to the widow. On May 11, 1929, petitioner appealed to the Board of Tax Appeals, which, on June 23, 1931, entered its decision sustaining the asserted deficiencies of $30,278.28 for 1924, and $16,580.85 for 1925. On December 21, 1931, a petition for review of the Board's decision was filed in the Circuit Court of Appeals for the Third Circuit, but the assessment and collection of the deficiencies not having been stayed pending review by the filing of a bond under the provisions of Section 1001 of the Revenue Act of 1926 (Appendix, *infra*, pp. 14–15), they were assessed against and paid by petitioner on February 10, 1932, together with interest of $18,279.01 (R. 3–4, 18.) On April 26, 1933, the Circuit Court of Appeals reversed the decree of the Board and, pursuant to the mandate of the appellate court, on July 7, 1934, the Board entered its decision holding that there were no deficiencies due from petitioner for the years 1924 and 1925, but that, pursuant to a stipulation, there were overpayments for such years in the respective amounts paid on February 10, 1932 (R. 4). That decision became final on August 7, 1934, under the provisions of Section

1005 of the Revenue Act of 1926 (Appendix, *infra*, pp. 15–16).

Under date of January 22, 1931, the Commissioner had asserted a deficiency in the amount of $10,262.28 against petitioner for the year 1928. On March 6, 1931, petitioner appealed to the Board of Tax Appeals from that determination and the Board, on September 29, 1934, entered a decision pursuant to stipulation, that petitioner had overpaid its taxes for the year 1928 in the amount of $4,376.39. No petition for review of that decision was filed (R. 4–5) and it became final on December 29, 1934. Section 1005, *infra*.

The widow, in the meantime, had filed claims for refund of the taxes paid during the years 1924 to 1927, inclusive, on that portion of her income received from the trust during those years on the ground that the income represented a return of her dower and/or statutory rights which she had relinquished when she had elected to take under her husband's will (R. 23). The Commissioner allowed substantially, though not exactly, the amounts claimed on the grounds asserted in the claims, refunding to her in September 1931, an aggregate of $60,636.12 as taxes, together with statutory interest thereon in the amount of $17,588.73 (R. 24). No part of these refunds have been repaid by the widow (R. 25).

The tax that would have been payable by the widow on the income she received from the trust

during the year 1928 would have been in excess of $4,376.39, the amount of the overpayment found by the Board to have been made by petitioner on its income for that year (R. 24).

There are no income, war-profits, or excess profits taxes or instalments thereof due from petitioner on any income taxable to it, as such trustee, for any of the years 1924 to 1928, inclusive (R. 5, 19).

This action was instituted on February 20, 1935 (R. 2). The petition prayed that respondent be commanded and directed to refund to petitioner the sum of $65,138.14 and the sum of $4,376.39, representing the amounts of overpayments found by the Board, together with statutory interest on both amounts (R. 6).

The petition alleged a demand upon respondent and the latter's refusal to refund the overpayments (R. 5). The answer denied that there had been any demand for the refund of the overpayments for the years 1924 and 1925 except that on January 26, 1934, petitioner had filed claims for refund of these amounts. Respondent admitted that those claims for refund had neither been allowed nor rejected, alleging that they were still under his consideration, and that the claims had been on file more than six months at the time this suit was instituted (R. 19–21). With reference to the overpayment for 1928, respondent denied that there had been a formal demand for a refund,

alleging that petitioner had, by counsel, orally and by informal correspondence requested the refund. Respondent admitted that he had not made the refund, but denied that he had refused it, averring that it was under consideration (R. 20–23).

The answer further resisted issuance of the writ on the grounds that it sought to control the exercise of his discretion; that the petitioner had an adequate and complete remedy at law; and that the petition was premature and untimely because it failed to show a formal demand for the refunds and/or a positive refusal, or acts tantamount thereto, to make the same (R. 21–22). The answer further asserted that petitioner in equity and good conscience was not entitled to the relief prayed for, since petitioner and the widow were the same parties in interest, the petition was for the widow's sole benefit, and any relief granted would unjustly enrich her because the refunds made to her were erroneously and mistakenly made and had not been repaid and because she had failed to pay any tax on the income she received from the trust during 1928 (R. 24–25).

Petitioner's demurrer to the answer (R. 26–29) was overruled by the District Court for the District of Columbia and, petitioner electing to stand thereon, the petition was dismissed (R. 29). The decision was affirmed on appeal by the United States Court of Appeals for the District of Columbia (R. 40).

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ARGUMENT

Except for procedural differences the instant case is very similar to the case of *White* v. *Stone*, 78 F. (2d) 136 (C. C. A. 1st), certiorari denied, 296 U. S. 596.[1] Both Stone and the present petitioner sought, as trustees, to secure for the benefit of the beneficiary a refund of taxes improperly assessed against and paid by them, after recovery by the Government from the proper taxpayer—the beneficiary—had become impossible. The proceeding in the *Stone* case was an action for money had and received, and it was held that, under the circumstances, an equitable set-off should be allowed. Morton, J., concurred on the ground that an action for money had and received is equitable in character, and in order to recover plaintiff must show that defendant has money which in equity and good conscience he ought not to retain, and plaintiff could make no such showing. *Champ Spring Co.* v. *United States*, 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *Lewis* v. *Reynolds*, 284 U. S. 281; *Myers* v. *Hurley Motor Car Co.*, 273 U. S. 18; *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386; *Bull* v. *United States*, 295 U. S. 247. See also *United States Paper Exports Ass'n* v. *Bowers*, 80 F. (2d) 82 (C. C. A. 2d). The court below held that there was no reason why the same principle should not apply here, invoking the

[1] Time for filing a petition for rehearing has been extended to November 2, 1936.

well-established principle that a writ of mandamus issues not as a matter of right, but only in the exercise of sound judicial discretion and to compel the performance of an act which in equity and good conscience ought to be performed. *United States* v. *Dern*, 289 U. S. 352, 359; *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 311. It is submitted that the decision is correct.

Petitioner urges, however, that the present case should have been distinguished from the *Stone* case, *supra*, because in the latter the Government's claim against the beneficiary was for taxes due for the same years for which the trustee had overpaid its taxes, whereas in the instant case the claims against the beneficiary are for erroneous refunds as well as for taxes, and cover years other than those for which the trustees paid excessive taxes. The court below properly held that the moral obligation to repay erroneous refunds or taxes for other years was equally as strong as the moral obligation in the *Stone* case.

Petitioner further contends that because the erroneous refunds made to the widow for the years 1927 and 1928 were not matched by corresponding overpayments for those years by the trustee, the decision is in conflict with *United States* v. *Irving Trust Co.*, 77 F. (2d) 852 (C. C. A. 2d). In that case a trustee in bankruptcy sought, unsuccessfully, to resist a claim for taxes due from the bankrupt for the year 1927 by a set-off of an overpay-

ment of taxes for the year 1931, after recovery of the overpayment had been barred by limitation. It seems clear that the decision below neither specifically nor inferentially permits a credit or a recoupment of the nature attempted in the *Irving Trust* case. The basis of the decision below is that petitioner in equity and good conscience has not shown a right to the exercise of the court's power in its behalf. The court specifically (R. 37) put aside as unnecessary to the decision a consideration of the right of the Government to a credit, counterclaim, or recoupment of the erroneous refunds made to the widow. Petitioner, to recover, must rely on the strength of its own case (*Champ Spring Co.* v. *United States, supra*) which it has not been able to demonstrate. The answer interposed by respondent, setting forth the facts of the erroneous refunds to the widow for the years 1924 to 1927 and her failure to pay any tax on the income of the trust for the year 1928, does not pray for any specific relief. It merely states uncontroverted facts and the ultimate conclusion to be drawn from them, namely, that the widow beneficiary being the real party in interest in this suit, respondent in equity and good conscience should not be directed to refund to petitioner the amounts prayed for in its petition.

In addition to the fact that the decisions on the present question are in accord, there is a further

reason why the present petition should be denied. Petitioner, by invoking mandamus instead of an ordinary legal remedy, has subjected its claim to the discretion of the court (*National Fire Ins. Co.* v. *Wilson*, 8 Pet. 291, 301), and while this Court in the exercise of its power of general supervision over the decisions of the lower courts may properly review the action taken there on applications for mandamus, it appears to be its settled policy, exclusive of all other considerations, not to disturb a decision when it represents the exercise of the sound judicial discretion of the court below. *Arant* v. *Lane*, 249 U. S. 367, 371; *United States* v. *Dern, supra; Duncan Townsite Co.* v. *Lane, supra.* The possibility of conflicts among the decisions of courts yet to pass on similar claims presented in ordinary legal actions,[2] when the discretionary powers of those courts will be less emphasized, is, therefore, no basis for the allowance of the present petition.

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[2] Such cases originated by reason of an unfortunate conflict of authorities (*Warner* v. *Walsh*, 15 F. (2d) 367 (C. C. A. 2d); *United States* v. *Bolster*, 26 F. (2d) 760 (C. C. A. 1st); *Allen* v. *Brandeis*, 29 F. (2d) 363 (C. C. A. 8th), prevailing prior to the decision of this Court in *Helvering* v. *Butterworth*, 290 U. S. 365. The case of the *First Nat. Bank of Birmingham* v. *United States*, 12 F. Supp. 301 (N. D. Ala.), now on appeal, is the only other decided case in this category and is in accord with the decision in the *Stone* case.

CONCLUSION

The decision below was rendered in accordance with the decisions of this Court. There is no conflict of authority. The petition should be denied.

Respectfully submitted.

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CHARLES A. HORSKY,
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SEPTEMBER 1936.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

ESTATES AND TRUSTS

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries.

* * * * *

(b) * * * The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *

Revenue Act of 1926, c. 27, 44 Stat. 9:

CREDITS AND REFUNDS

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

* * * * *

(d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

* * * * *

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

* * * * *

COURT REVIEW OF BOARD'S DECISION

SEC. 1001 [as amended]. (a) The decision of the Board rendered after the enactment

of this Act [1] * * * may be reviewed by a Circuit Court of Appeals, * * * if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.[2]

* * * * *

(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review * * * is duly filed by the taxpayer, and then only if the taxpayer * * * has filed with the Board a bond * * * conditioned upon the payment of the deficiency as finally determined, * * *.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, * * * (U. S. C., Title 26, Secs. 641, 644, 645).

DATE ON WHICH BOARD'S DECISION BECOMES FINAL

SEC. 1005. (a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if

---

[1] Revenue Act of 1926, approved February 26, 1926.

[2] Three months, under Section 1101 of 1932 Act (U. S. C., Title 26, Sec. 642).

no such petition has been duly filed within such time; * * * (U. S. C., Title 26, Sec. 640).

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 322 [as amended, c. 277, 48 Stat. 756, sec. 504 (a)]. REFUNDS AND CREDITS.

(a) *Authorization.*— Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) Period of Limitation.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(c) *Effect of petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments, determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with

the decision of the Board which has become final; * * *

* * * * *

(d) *Overpayments found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid within two years before the filing of the claim or the filing of the petition, whichever is earlier.

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax * * * assessed or paid * * * after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim (U. S. C., Title 26, Sec. 1670).

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

* * * * *

(b) Any portion of an internal-revenue tax * * * which has been erroneously refunded * * * may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of

such refund or before May 1, 1928, whichever date is later (U. S. C., Title 26, Sec. 1646).

Revised Statutes:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail (U. S. C., Title 26, Sec. 1672).

Judicial Code:

SEC. 24 [as amended]. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. * * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced (U. S. C., Title 28, Sec. 41).

SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * * (U. S. C., Title 28, Sec. 250).

U. S. GOVERNMENT PRINTING OFFICE: 1936.